

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 432 of 1978

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 to 5 No

SANJIVANIBEN GOVIND MAHADEV JOSHI

Versus

NATTHU GANESH SALADKAR

Appearance:

MR PR THAKKAR for Petitioner

Mr.B.I.Mehta for MR VH DESAI for Respondents.

CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 21/04/98

ORAL JUDGEMENT

This First Appeal by the original plaintiff is directed against the judgment and order dated 28.9.1977

passed by the learned 2nd Joint Civil Judge (S.D.), Baroda in Special Civil Suiit No.47/73 holding that the plaintiff, who was found to have undivided 1/4th share in the suit house, is not entitled to enforce partition by metes and bounds till respondents Nos.1 and 2 choose to divide their respective shares.

The appellant and respondent No.3 are sisters and the respondents Nos. 1 and 2 are their brothers. Their father Ganesh Saladkhar died intestate on 11.4.1959 leaving a house which is the subject matter of the present litigation between the parties. According to the appellant, the respondents Nos.1,2 and 3 fraudulently got their names mutated in the city survey record and subsequently respondents Nos.2 and 3 released their shares in favour of respondent No.1 and his name alone was mutated in the City Survey record as owner. The appellant came to know about this in 1971 and applied to the City Survey Officer for entering her name in the record. The City Survey Officer, after holding an inquiry, found that the appellant too was an heir of the deceased and entered her name as co-owner.

On 1.3.1973, the appellant filed the present suit contending that she had got 1/2 share in the suit property because of the release of their shares by respondents Nos.2 and 3. She prayed for declaration of her share in the property and for partition by metes and bounds. The respondent Nos.4 and 5, who were in occupation of the ground floor of the suit house as tenants, were joined as defendants Nos.4 and 5 since the plaintiff claimed a share in the rent payable by them.

The respondents Nos. 1 to 3 resisted the suit. The relationship between the parties as stated in the plaint was not disputed. However, they contended that the respondents Nos. 2 and 3 had not released their shares. They denied that the plaintiff had 1/2 undivided share in the suit property.

After recording evidence, the learned trial Judge found that the plaintiff had failed to prove that defendants Nos. 2 and 3 had released their shares in the suit property. He also found that the plaintiff had 1/4th share in the suit property and not 1/2 share as claimed by her. However, having found that the plaintiff had undivided 1/4th share in the suit property, the

learned Judge held that since the suit house was a dwelling house the plaintiff, who was a female heir, was not entitled to enforce partition by metes and bounds till her brothers chose to divide their respective shares in view of the provisions contained in section 23 of the Hindu Succession Act. He, therefore, by his judgment and order dated 28.9.1977, granted the declaration that the plaintiff has undivided 1/4th share in the suit property, but refused the relief of partition by metes and bounds till her brothers chose to divide their respective shares. She was also held entitled to 1/4th share in the rental income and defendants Nos.5 and 6, who were the tenants, were directed to pay 1/4th of the rent directly to her.

The appellant being aggrieved by the rejection of her claim for partition, has filed this appeal.

Now, section 23 of the Hindu Succession Act reads as under:-

"23. Where a Hindu instate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

It was urged before the learned trial Judge on behalf of the appellant that the bar to claim for partition will apply only to a dwelling house which is wholly occupied by the members of the family of the deceased, but since there were two tenants occupying the ground floor of the suit house, it could not be said that dwelling house was wholly occupied by the members of the

family of the deceased father and hence section 23 was not applicable. The learned Judge, however, rejected this contention after referring to the commentary on the said section in Mulla's Hindu Law. However, since the judgment of the trial Court there have been two decisions, one of this Court and the other of the Supreme Court accepting the contention which is advanced on behalf of the appellant. In VANITABEN BHAISHANKER PANDYAv. DIVALIBEN PREMJI & ORS.,(20 GLR,148), a Division Bench of this Court held as follows:-

"A right of a female heir as specified in sec.23 of the Hindu Succession Act to claim partition of the dwelling house does not arise until the male heirs choose to divide their respective shares therein. However in the instant case the property is not wholly occupied by the members of the family of the deceased. The property is occupied partly by the members of the family of the deceased and partly by a tenant, and therefore, even if the property is taken as a dwelling house on the ground that a substantial part of it is being used for that purpose, even then, the requirement of occupation of the entire property by the members of the deceased family is not met with."

In Narashimaha Murthy v. Smt.Susheelabai and others, AIR 1996 Supreme Court 1826, the Hon'ble Supreme Court held as follows in para 31 of the judgment:-

"What is meant to be covered in Section 23 is a dwelling-house or houses (for the singular would include the plural, as the caption and the section is suggestive to that effect) fully occupied by the members of the intestate's family and not a house or houses let out to tenants, for then it or those would not be a dwelling-house/houses but merely in description as residential houses. The section protects only a dwelling house, which means a house wholly inhabited by one or more members of the family of the intestate, where some or all of the family members, even if absent for some temporary reason, have the animus revertendi."

In view of the above decisions, now there is no doubt that section 23 of the Hindu Succession Act will

not apply when the property being partly occupied by tenants is not wholly occupied by members of the family of the deceased. The learned Advocate Shri B.I.Mehta, who appeared for respondents Nos. 1 to 3, could not dispute this proposition. In the present case, the ground floor of the suit house is admittedly occupied by two tenants. Hence, though the first floor of the house is occupied by respondents Nos. 1 and 2 and one room is occupied by respondent No.3, it cannot be said that the house is a dwelling house occupied wholly by members of the deceased-father. The bar of section 23 of the Hindu Succession Act cannot, therefore, come in the way of the appellant in her claim for partition. It is not now in dispute that she has 1/4th share in the suit house. She is, therefore, entitled to have the suit house partitioned. The appeal is, therefore, allowed. The finding of the trial Court that the appellant has 1/4th share in the suit house is confirmed. There will be a preliminary decree for partition. The trial Court shall proceed to partition the suit house according to law in accordance with the shares of the parties as determined by the judgment under appeal. The trial Court may appoint a Commissioner for effecting partition, if necessary. Since this is a very old matter, the trial Court shall endeavour to dispose of the proceedings for partition of the property at the earliest, preferably within six months from the date of the receipt of the writ. In the circumstances, there shall be no order as to costs.
